FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 248

FLOYD FARMER, Administrator of the Estate of Donald Lewis Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

WILLIE FARMER, Administrator of the Estate of Thomas Donald Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

FYKE FARMER,
1111 American Trust Building,
Nashville 3, Tennessee,
Attorney for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioners, Floyd Farmer, Adm'r, and Willie Farmer, Adm'r, ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Sixth Circuit rendered in these two cases on February 28, 1959. Associate Justice Potter Stewart on May 26, 1959 extended the time for filing a petition for writ of certiorari to and including July 28, 1959. Since the two cases involve identical or closely related questions, a single petition is presented covering both cases.

OPINIONS BELOW.

These are actions brought by petitioners for the recovery of damages from Louisville & Nashville Railroad Company for the deaths of their sons in a railroad crossing accident. Jurisdiction of the district court arose from diversity of citizenship. There have been two trials of the cases.

At the first trial, the district court rendered judgments on jury verdicts in favor of petitioners for $30,000.00 in each case. On appeal by the railroad, the Court of Appeals reversed for error in instructions and granted new trials. On the second trial, there was a jury verdict for the railroad in both cases. The judge who presided at both trials died without having entered judgments on the verdicts. Another judge entered judgments and overruled petitioners' motions for a new trial in each case. Petitioners appealed from the judgments to the Court of Appeals.

The opinion of the Court of Appeals reversing the judgments in favor of petitioners upon the first trial is reported as **L. & N. Ry. Co. vs. Farmer, 220 F2d 90,** and **224 F2d 599** (opinion on rehearing).

Neither the district court nor the court of appeals delivered an opinion on the second trial.

JURISDICTION.

The grounds on which the jurisdiction of this Court are invoked are as follows:

(i) The date of the decision of the Court of Appeals, affirming the judgment of the district court on order, without opinion, is February 28, 1959.

(ii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Is it a part of the right of trial before a jury guaranteed by the Seventh Amendment in a case where there is serious conflict in the evidence on material issues to have the same judge who presided at the trial and, therefore, was the only judge having opportunity to observe the bearing and demeanor of the witnesses decide whether or not to enter judgments on the verdicts and pass on a motion for a new trial where the questions whether the verdict is against the overwhelming weight of the evidence and is based upon evidence which is false are raised?

2. Were the judgments on the jury verdicts and the denial of petitioners' motions for a new trial made by a judge who did not preside at the trials of these cases an unconstitutional abridgment of petitioners' right to trial by jury under the Seventh Amendment?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

United States Constitution—Amendment VII—Civil Trials:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Act of June 19, 1934, Chap. 651, by which Congress authorized the Supreme Court to prescribe rules for the district courts provides:

> ". . . Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant . . ."

Sec. 2 of the Act, authorizing the uniting of equity rules with those in actions at law so as to secure one form of civil action and procedure for both contains the following proviso:

> ". . . **Provided, however,** That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

Rule 63 of the Rules of Civil Procedure is as follows:

> **"Disability of a Judge.**
>
> "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the

court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

STATEMENT OF THE CASE.

Petitioners' complaints presented three theories of liability on the part of the railroad: (a) violation of a state statute known as the Tennessee Railway Precautions Act; (b) violation of a municipal speed ordinance limiting the speed of trains to 30 miles per hour; and (c) common law negligence in the operation of the train across the crossing, which was an extra-hazardous one in Springfield, Tennessee, where the railroad's tracks intersect Main Street, which was designated as both a state highway and a United States highway.

The railroad denied liability on all three theories and set up the affirmative defense of contributory negligence on the part of both the driver and the guest who were killed in the accident.

The Case Based on the Tennessee Railroad Precautions Act.

The Tennessee Railroad Precautions Act, Section 2628 (4) of the Code of Tennessee, provides:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

The particular violations of the above statute alleged by the plaintiffs were:

(a) Failure to comply with the duty to keep a lookout ahead; and

(b) Failure of the engineer, when the automobile in which plaintiffs' intestates were riding appeared "upon the road", to put down the brakes and to employ any means to prevent the accident.

Certain facts were admitted by the engineer and the fireman on the locomotive in their testimony and were, therefore, undisputed, viz.:

(1) Although both the engineer and the fireman testified that they were looking straight ahead as the train approached the crossing, neither saw the Farmer automobile until **after** the collision had occurred;

(2) The engineer had not applied the brakes as the train approached the crossing, but did so **after the impact.**

The engineer died after the first trial and before the second trial. Discovery depositions of both the engineer and the fireman taken between the two trials were read by the plaintiffs on the second trial. As regards the above facts, the summary of their testimony at the first trial contained in the opinion of the Court of Appeals (220 F. 2d 93-94) is correct as to the evidence at the second trial.

The evidence at the second trial as regards the place where the Farmer car appeared around the corner of the obstructing building at the intersection was not materially different from the evidence at the first trial. It was substantially undisputed that after the car had passed the corner of the building and was on the nearmost (side-track in Court of Appeals' opinion) of the two railroad tracks running across Main Street, it stopped or checked its speed and came nearly to a stop at a point about eight

or ten feet from the path of the train (Testimony of Roy Ashbranner, Appendix to Main Brief of L. & N. Railroad Co., Appellee, page 14b; cf. L. & N. Railroad Co. v. Farmer, 220 F. 2d 93).

The evidence as to the speed of the train and the length of time the crossing signals had been in operation before the Farmer car appeared on the road ahead of the train was in serious conflict. And on the second trial there was the same conflict as on the first on the issue of whether or not the passenger or guest told the driver, when the car stopped or came nearly to a stop on the nearmost track to "go ahead." (See Summary by Court of Appeals of testimony of Ray Baker and Herschel Crawford on this point, L. & N. Ry. Co. v. Farmer, 220 F. 2d 95.)

On the second trial, the railroad called a new witness, Dewey Kelley, the Chief Dispatcher of the railroad's Evansville Division. This witness introduced in evidence a traingraph or record made by the automatic Central Train Control (CTC) System, and testified that it showed that for a distance of a half mile before the train entered the Main Street crossing, and at the time of the accident, the train speed was only 30 miles per hour. This evidence, which was not introduced by the railroad at the first trial, took the plaintiffs by surprise. Although the witness Kelley was subjected to cross-examination which greatly impaired the value of his testimony, it doubtless was accepted by the jury as corroborating the testimony of the engineer and the fireman that the train speed had been reduced from 65 miles per hour to 30 miles an hour as the train came into the corporate limits of Springfield and as conclusive on the issue as to the speed of the train.

The critical part of the traingraph, when it was presented in evidence, was obscured by a blot claimed by the railroad to have been made by the dispatcher on duty the night of the accident. This dispatcher was not called as a witness.

After the trial, plaintiffs caused a color slide to be made of this portion of the traingraph. Obtaining the necessary technical information for interpreting the traingraph, they then filed affidavits showing that the conclusion of the Chief Dispatcher that the graph showed that the train speed when it entered the crossing was only 30 miles an hour was unscientific and that the traingraph, with the part underneath the blot exposed and correctly interpreted, showed that the train speed was 60 to 65 miles an hour (Affidavit of Fyke Farmer filed April 20, 1956, Appendix to Main Brief of Appellants, page 135a; Excerpts from Plaintiffs' Interrogatories filed after the verdict on Jan. 25, 1956 and the answers of the defendant L. & N. R. Co. thereto, Appendix to Main Brief of Appellants, pp. 100a-103a; Affidavit of R. B. Overton, filed Nov. 19, 1956, Appendix to Main Brief of Appellants, page 115a; Affidavit of James A. Hamilton, Jr., filed Jan. 27, 1958, Appendix to Main Brief of Appellants, page 127a).

Conflict in Evidence as to Train Speed.

On the material issue as to the speed of the train, there was serious conflict in the evidence.

A Evidence relied upon by the plaintiffs that the train was travelling at a speed of 60 miles per hour.

Roy Ashbrenner, city policeman and an eyewitness, testified orally that he estimated the speed of the train at about 60 miles per hour (Appendix to Main Brief of Appellants, page 19a).

Plaintiffs showed by uncontradicted evidence that after the service application of the brakes was made by the engineer as soon as he looked out the side window of the locomotive and saw there had been a collision, the train travelled two city blocks, a distance of approximately a third of a mile before it came to a stop. The plaintiffs also introduced the expert testimony of Sidney S. Acker,

head of the Mechanical-Engineering Department of Vanderbilt University, that if the train were travelling at 30 miles an hour at the time of the accident, the service application of the brakes the engineer claimed that he made would have brought the train to a stop in 521 feet (Appendix to Main Brief of Appellants, Stanfield, pages 51a-52a, Gloster, page 63a, Statement of Roy R. Ashbranner, page 40a, Acker, page 59a).

Stanfield, the engineer, testified:

"Q. And you didn't see the car afterwards?

A. No, I didn't hang out my head and look to see [what] it was. I didn't know what it was, it might have been an oil truck for all I know."

Appendix to Main Brief of Appellant, pp. 58a-59a.

The photographs of the demolished automobile taken immediately after the accident which the plaintiffs introduced in evidence showed it resting on a battery box 50 feet from the point of impact.

It was undisputed that the automobile was tossed up in the air high enough for the three occupants on the front seat to have fallen out of the car on the side of the driver and for their bodies to have been found alongside the rails beyond the place where the car came to rest on top of the battery box.

B. **Evidence relied upon by the defendant railroad that the train speed was not in excess of 30 miles per hour.**

The testimony of the engineer and fireman summarized by Court of Appeals in **L. & N. R. Co. v. Farmer, 220 F. 2d 93-94.**

The testimony of Dewey Kelley, the Chief Dispatcher, excerpts from which are printed in Appendix to Main Brief of Appellants at pages 64a-78a and in Appendix to Main Brief of Appellee at pages 44b-51b.

Evidence Tending to Show That Engineer and Fireman Were Not Keeping Attentive Lookout Ahead.

The Court of Appeals in **L. & N. R. Co. v. Farmer, 220 F. 2d 94,** expressed the conclusion that the fact that the engineer did not see the Poole automobile pass over the tracks ahead of the Farmer car was "an indication that he was not very keenly on the lookout," and with respect to the testimony of the fireman said: "Apparently he was not very attentive as a lookout."

In the deposition of the engineer, taken between the two trials, the engineer admitted that he knew that the Main Street crossing in Springfield was a busy crossing, with a lot of automobiles, heavy traffic, going back and forth at the time of night the Georgian train passed there, and that Saturday (on which the accident happened) was a "busy night" (Appendix to Main Brief of Appellants, pages 52a-53a).

Proceedings in District Court After Verdict and Prior to Entry of Judgment.

The jury's verdicts on the second trial were filed on December 13, 1955. Judgments on the verdicts were entered on December 17, 1957. Immediately after the trial counsel for the railroad prepared judgments but agreed that for a limited period of time the judgments could be withheld from entry pending an investigation plaintiffs' counsel was making concerning the traingraph the railroad had introduced in evidence. The facts regarding this investigation are stated in an affidavit made by plaintiffs' counsel, which was filed April 20, 1956 (Appendix to Main Brief of Appellants, pages 135a-145a).

On February 14, 1956, plaintiffs filed a motion that judgment be withheld pending a discovery by plaintiffs and moved for leave to take the depositions of the superin-

tendent of the railroad's Evansville Division and the dispatcher on duty the night of the accident. On April 20, 1956, plaintiffs filed an amended motion asking leave also to examine the L. & N. Trainmaster, who obtained statements from the engineer and fireman on the Georgian train after the accident (Appendix to Main Brief of Appellants, pages 104a and 107a).

On April 18, 1956, there was a hearing on plaintiffs' motions before Judge Davies, who has presided at both trials on plaintiffs' motions. Judge Davies took them under advisement. Thereafter affidavits were filed by both parties (Docket entries in Appendix to Main Brief of Appellants, pages 2a-3a). On May 17, 1956, plaintiffs filed a motion for a hearing on the question of the entering of the judgments on the jury verdicts and for an opportunity to examine witnesses, including the railroad's superintendent, in open court after plaintiffs had been given opportunity to examine the railroad's traingraphs for a period of 90 days before the accident and for 30 days after the accident.

Due to a protracted illness, Judge Davies was never able to hold another hearing or rule on plaintiffs' motions. His death occurred on January 7, 1957.

On November 19, 1957, the plaintiffs filed a motion that the district court set aside the verdicts of the jury and grant a discretionary new trial under the authority conferred by Rule 63 of the Federal Rules of Civil Procedure upon the ground that questions of credibility of witnesses who testified in open court, **including Dewey Kelley**, would necessarily have to be passed on by the judge ruling on motions for a new trial and such questions could properly be decided only by a judge who had opportunity to observe the demeanor of the witnesses on the stand (Appendix to Main Brief of Appellant, pages 114a-115). Specifically, the plaintiffs in this motion averred:

"1. The verdicts were based upon the false conclusions from the traingraph presented by the testimony of Dewey Kelley, Chief Dispatcher of the Evansville Division of the L & N Railroad Company, that the Georgian train travelled from south switch to north switch, a distance of 2552 feet, in a minute, or at a speed of only 30 miles per hour, whereas the traingraph shows the train passed through the north switch OS Section less than 50 feet from the place of the accident at an average speed of not less than 58.8 miles per hour.

"Plaintiffs attach hereto the affidavit of R. B. Overton supporting the above ground of their motion. They offer to exhibit the color slide and testimony in open court to further support said ground."

The affidavit of R. B. Overton, filed on Nov. 19, 1957, in support of the motion stated:

"That he worked for the L & N as train dispatcher from 1913 until 1957 when he retired. During the last 15 years he handled and directed the operation of the CTC machine at Athens, Alabama, on the Birmingham Division of the L & N Railroad.

"That he has examined the original traingraph of the Henderson Division of the L & N Railroad for August 24, 1952, filed as an exhibit in the above-styled cases. He has also examined the color slide of that portion of the traingraph representing the passing of Train No. 80 through south switch and north switch Springfield, Tenn., under enlargement shown him by Fyke Farmer, attorney for the plaintiffs. The marks made by the automatic pen for the O. S. Section at north switch in green ink appear clearly enough under the blue ink of the dispatcher's pen to enable a fairly accurate determination to be made of the length of time train No. 80 occupied the north switch O. S. Sec-

tion. It appears to affiant the time of such occupancy was not longer than 15 seconds from which it follows that the average speed of the train through said O. S. Section was not less than 58.8 miles per hour."

Appendix to Main Brief of Appellants, pages 115a-116a.

The Judgment and Rulings of the Successor Judge.

On December 17, 1957, the other regular judge of the district court entered judgments on the jury verdicts, but by the order expressly reserved decision on plaintiffs' application for a new trial pursuant to Rule 63 of the Federal Rules of Civil Procedure and the other motions filed by the plaintiffs subsequent to the verdict of the jury (Appendix to Main Brief of Appellants, pages 116a-117a).

Motions for new trials under Rule 59 of the Federal Rules of Civil Procedure were duly filed by the plaintiffs raising the questions that the verdicts were against the overwhelming weight of the credible evidence and were contrary to the law and the evidence. The motions also sought a new trial on the basis of the newly discovered evidence concerning the traingraph with supporting affidavits (Appendix to Main Brief of Appellants, pages 118a-129a). In their motions for a new trial, plaintiffs offered the color slides which they had procured after the trial in evidence and moved for a hearing in court at which they would have opportunity to exhibit them on a screen (Appendix to Main Brief of Appellants, pages 124a-125a).

The defendant railroad furnished the court reporter's transcript of the trial proceedings. The same judge who had entered judgments on the verdicts without prejudice to plaintiffs' motions for new trials under Rule 63 on April 24, 1958, holding that he could properly perform the duty of passing on all pending motions, denied them without

assigning any reasons other than, "the Court is of the opinion that said motions are not well taken and they are accordingly hereby denied" (Appendix to Main Brief of Appellants, page 130a).

Judgment of Court of Appeals.

The cases were argued in the Court of Appeals on February 21, 1959. On February 28, 1959, the Court announced its decision, affirming the judgment of the district court on order, without opinion. The order stated;

> "And it appearing that there was substantial evidence to support the jury verdicts in favor of the defendant and that no reversible error inheres in the conduct of the trial by the district judge, or in his charge to the jury; and it appearing further that there is no valid ground for the granting of a new trial on the basis of newly discovered evidence;
>
> "The judgment of the district court in each case is affirmed."

ARGUMENT.

Take away the railroad's evidence given by its employees, the engineer, the fireman and the chief dispatcher, that the train was not exceeding 30 miles an hour when it struck the automobile on the crossing and there would be no evidence to support the verdicts. Take away the evidence given by the chief dispatcher based on the train-graph introduced at the second trial upon a weighing of the testimony given by the engineer and the fireman by a judge who observed their demeanor on the stand in "the spirit of honest desire" for the truth and to see that only justice was done, and the verdicts would be equally insupportable. Upon the weighing of the testimony of the engineer and fireman by the same judge who heard them testify at the first trial, especially in light of the showing made by plaintiffs by the post-trial affidavits that the conclusions of the chief dispatcher were unscientific and false, the trial judge would have been bound in good conscience to hold that to enter judgments on the verdicts would be a gross miscarriage of justice. Here is the reason why.

The Controlling Rules of Law.

(a) Proof by the plaintiffs that the automobile became an obstruction on the track and that there was a collision shifted the burden on the railroad to prove that all the statutory precautions were complied with and that the accident was unavoidable.

(b) As interpreted by the Supreme Court of Tennessee, the statute requires the utmost vigilance, the greatest possible care and diligence, and the use of every possible means on the part of railroad companies and their agents, to prevent injuries to persons and property.

(c) The impossibility to check the train before colliding with the obstruction does not excuse nonobservance

of the statutory precautions in other respects, where such observance is possible.

(d) To place liability upon the railroad company, it was not necessary to show that the violation of the statute was the proximate cause of the accident, but only that the statute had been violated.

(e) The grossest negligence, directly and proximately contributing to the accident, will not defeat an action based on the statute, but will go only in mitigation of damages, where the railroad fails to comply with the required precautions, whether its failure to comply with the statute is the cause of action or not.

(f) Although, where the appearance of the obstruction on the track is so nearly simultaneous with the collision there is no opportunity for observance of the duty of putting down the brakes or taking other means to prevent an accident before the collision, the duty of the enginemen respecting the automobile is to be tested by common law principles, if the train approached a much used crossing whereon the presence of persons or automobiles might reasonably be anticipated, at a rate of speed which the engineer knew, or should have known, would render it impossible to comply with the requirements of the statute if an obstruction appeared on the crossing, the non-observance of the statutory precautions would not be excused and the railroad would be liable.

The Law of the Case As Declared by the Court of Appeals.

A. **As respects the Lookout duty.**

". . . .The jury properly was told that the statute contemplates an efficient and watchful, and not merely a perfunctory lookout; that a lookout failing to see what due care would have revealed would not properly be discharging his duty; and that an obstruction

might appear on the road which, under the statute, would require the train crew to put down the brakes and employ every possible means to stop the train and prevent an accident, even though the obstruction was not seen, but should have been seen by an observant lookout.

"The judge charged specifically: 'It was shown in evidence that the Farmer automobile was following immediately behind an automobile driven by Odell Poole, going in the same direction on Main Street; that the Poole automobile crossed the railroad tracks in front of the approaching Georgian train after the warning signal at the crossing had been set in operation, and at a moment when the train was very close upon him; that the Farmer automobile behind Poole reached the side track and came to a stop, or practically to a stop, before proceeding towards the main track. While both the engineer and the fireman on the train testified that they were on the lookout ahead when the train approached the Main Street crossing, neither of them, according to their testimony, saw the Poole automobile and did not see the Farmer automobile until the collision occurred. If you find that an observant lookout should have disclosed to the engineer or the fireman the appearance of the Poole automobile upon the road, you would be authorized to infer from the failure of the engineer and fireman to see it that the lookout was negligent and heedless, and therefore there was a failure on the part of the railroad to comply with the requirements of the statute that it shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead.'"

L. & N. R. Co. v. Farmer, 220 F. 2d 97-98.

B. **As respects the speed of the train and the defense of impossibility of compliance with the statute and unavoidableness of the accident.**

"The jurors were further instructed that, although the burden of the statute would be lifted when the railroad company shows that it did all that the Railroad Precautions Statute required it to do and that the accident was unavoidable, liability would still exist if the negligent conduct of the railroad engineer deprived the carrier of the power to comply with the requirements of the statute.

"The judge pointed out that in such circumstances the carrier could not rely upon the impossibility of observance of the statutory precautions. He instructed the jury that the time available to the engineer in which to observe the statutory requirements would depend to a great extent upon the speed at which the train was moving. The jury was charged specifically: 'If you find that the defendant's Georgian Train approached the Main Street crossing in Springfield and that it was a much used crossing whereon the presence of persons or automobiles might reasonably be anticipated, at a rate of speed which the engineer knew, or should have known, would render it impossible to comply with the requirements of the statute if an obstruction appeared on the crossing the nonobservance of the statutory precautions would not be excused.

" **'The plaintiffs contend that the Georgian Train was moving at a speed of fifty to sixty miles an hour across Main Street in the City of Springfield and collided with the Farmer automobile, and there is evidence to support this contention. If you believe this evidence, and find that this speed made it impossible for the engineer to put down the brakes, or take any other possible means to stop the train before the col-**

lision, then the defendant would be liable under the Railroad Precautions Statute.' " (Emphasis supplied.)

How Petitioners Were Prejudiced by Judgments Entered by Judge Who Did Not Preside at Trial.

The above-quoted portions of the charge to the jury upon the first trial, having been specifically approved by the Court of Appeals, was the law of the case. It is on the basis of the law of the case—and particularly as declared in the italicized paragraph—that petitioners assert that without the evidence introduced by the railroad to show that the train was going, not 60 miles an hour as plaintiffs contended but only 30 miles an hour, there would be no evidence to support the verdicts. Upon undisputed evidence that the train speed was 60 miles per hour, according to the law of the case, there would be liability on the part of the railroad. The only question for the jury to decide would be damages. If the railroad's evidence creating a conflict on the issue of the speed of the train was believed by the judge who presided at the trial to be not credible it would have been his duty to set aside the verdicts and grant a new trial.

Only the judge who presided at the trial was competent to weigh the testimony of the engineer, the fireman and the chief dispatcher who gave this evidence for the railroad, for only he had observed their demeanor on the stand and had opportunity to take demeanor into account. Judge Davies had opportunity to observe the demeanor of the engineer and fireman on the stand at the first trial. The jury on this trial evidently did not believe their testimony that the train speed had been reduced from 65 miles an hour to 30 miles an hour as the train came into the corporate limits of the City of Springfield and was not in excess of 30 miles an hour at the crossing. As hereinabove stated the engineer died before the second trial. The railroad

did not put the fireman on the stand at the second trial. It called only the chief dispatcher with the traingraph. Judge Davies observed the demeanor of this witness for the railroad, Dewey Kelley.

At the second trial the plaintiffs read the discovery depositions of the engineer and the fireman and thereby proved the necessary evidentiary basis for the expert conclusions of the head of the Mechanical Engineering Department of Vanderbilt University which rebutted the statements of the two trainmen that the train speed was not more than 30 miles an hour. [This they had a right to do under the last sentence of Rule 26 (f) of the Federal Rules of Civil Procedure.] The railroad, of course, has its own experts who were qualified to show braking—stopping distances. None of these were called to contradict the expert opinions and conclusions of Mr. Acker, plaintiffs' witness.

In the extremity at which the railroad found itself when plaintiffs closed their case, it adopted the tactic of putting in the traingraph (which it had not seen fit to introduce on the first trial) and to call, not the dispatcher who was on duty the night of the accident and who had blotted out the significant part of the graph but, another dispatcher who gave the technically wrong, unscientific and false conclusions for the purpose of corroborating the evidence of the engineer and the fireman. Only Judge Davies, who observed the demeanor of this witness on the stand, possessed the qualifications for weighing his testimony. Judge Davies did not enter judgments on the verdicts. The judgments were entered by another judge, who presided at neither of the two trials. For this judge to hold that he was competent to perform the duties resting upon the court at the stage of the case at which he began to sit was an abuse of the discretion conferred by Rule 63 and a plain error of law.

The plaintiffs have been deprived of their right to have the judge who presided at the trial of the cases decide whether or not the verdicts were so palpably against the weight of the evidence, were contrary to the law and the evidence and were based upon false evidence, that judgments should not be entered on the verdicts or new trials granted.

The Court of Appeals' Misconception of the Duty of the Trial Judge as Regards Weighing the Evidence in Deciding Whether Verdict Should Be Set Aside.

The Court of Appeals, holding as it did that the district court did not err in denying a new trial because there was substantial evidence to support the verdicts, confused the functions of the court in passing on a motion for a new trial with those involved in passing on a motion for a directed verdict. In disposing of the constitutional question raised by petitioners in the way it did, the Court of Appeals departed from the rule established by the Sixth Circuit Court of Appeals more than a half century ago, and which, so far as the reported decisions disclose, has been followed ever since that time by that court of appeals and all the other courts of appeals that have had occasion to decide the question.

The Sixth Circuit Court of Appeals in an opinion by Judge Lurton in **Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463**, and in another opinion by Judge Taft in **Felton v. Spiro, 78 Fed. 576**, held that the function of a court in passing on a motion for a directed verdict is different from the function of weighing the evidence on motion for a new trial. In passing on a motion for a directed verdict, the court cannot properly undertake to weigh the evidence. "His duty," the Court said, "is to take that view of the evidence most favorable to the party

against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus." But, in passing on a motion for a new trial, the court is required to make a comparison of opposing proofs and decide whether injustice has been done by the verdict of the jury. As Judge Taft said, **"It is one of the most important rights which a party to a trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to take the case before another jury."** (Emphasis supplied.)

This rule was followed in **General American Life Ins. Co. v. Central Nat. Bank of Cleveland (C. A. 6th), 136 F. 2d 821,** which was the second appearance of that case in the Court of Appeals. The district judge on a former trial directed a verdict for the defendant insurance company. The Court of Appeals reversed holding that certain questions of fact should have been submitted to the jury. On retrial—the evidence being in the main similar to that adduced at the former trial—the district judge overruled a motion for a directed verdict. The jury found for the plaintiff against the insurance company. Judgment was entered on the verdict. In overruling a motion for a new trial, the district judge declared that to enter a judgment for the defendant insurance company in spite of the verdict for the plaintiff, **or to order a new trial** would not be consistent with the opinion of the Court of Appeals. The Court of Appeals on the second appeal remanded the case, with directions to the court below "to consider and act in its own discretion upon appellant's motion for a new trial, stating the reasons for his action." The Court of Appeals for the Sixth Circuit in its opinion in this case further said:

". . . In Felton v. Spiro, 6 Cir., 78 F. 576, 582, we said: 'It is apparent from the foregoing, that the

view of the learned judge at the circuit, expressed in the opinion on the motion for a new trial, that because the court cannot direct a verdict one way, it may not set aside a verdict the other way, as against the weight of the evidence, is erroneous. Indeed, as distinctly pointed out by Judge Lurton, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of the evidence. In the former there is no weighing of plaintiff's evidence with defendant's. It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter, it is always comparison of opposing proofs.'

"Appellant was entitled to have the court pass upon the motion for a new trial in the exercise of its own independent judgment. This it has not had. **It is entitled to have the court below weigh all the evidence, and exercise its discretion to say whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted, . . .'** Felton v. Spiro, supra, 78 F. page 583. (Emphasis supplied.)

Decisions of Other Courts of Appeals.

Decisions of other courts of appeals holding that a failure by the trial judge to exercise discretion whether to set aside a jury verdict upon the ground that it is against the weight of the evidence, or because he does not think that it is right, or an abuse of it is an error of law that may be corrected on appeal are:

Third Circuit.

Magee v. General Motors Corp., 213 F. 2d 899.

Fourth Circuit.

Garrison v. United States, 62 F. 2d 41;
Roedigar v. Phillips, 85 F. 2d 995;
Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350;
Snead v. New York Central Ry. Co., 216 F. 2d 169;
McCracken v. Richmond, Fredericksburg & Potomac Ry. Co., 240 F. 2d 484.

Fifth Circuit.

Marsh v. Illinois Central R. Co., 175 F. 2d 498.

Ninth Circuit.

Sou. Pac. Ry. Co. v. Guthrie, 186 F. 2d 926.

District of Columbia.

Eastern Airlines, Inc., v. Union Trust Co., 230 F. 2d 25, 99 U. S. App. D. C. 205. certiorari denied, 77 S. Ct. 816, 353 U. S. 942, 1 L. Ed. 760.

In **Marsh v. Illinois Central R. Co.**, supra, the Court of Appeals for the Fifth Circuit declared that the common law power of the trial judge to grant a new trial "in his discretion, irrespective of error and merely because he does not think the verdict right, is fully preserved" by the Seventh Amendment, citing **Parsons v. Bedford, Breedlove & Robeson, 3 Pet. 433, 7 L. ed. 732**, and saying further:

> "This matter was fully dealt with in the Sixth Circuit by successive opinions by Judges Lurton, Taft and Harlan, in Mt. Adams & E. P. Inclined R. Co. v. Lowery, 74 F. 463; Felton v. Spiro, 78 F. 576; and Travelers Ins. Co. v. Randolph, 78 F. 754. The same distinctions were maintained by this court in Howard v. Louisiana & A. R. Co., 5th Cir., 49 F. 2d 571. A motion for a directed verdict, or for a judgment notwithstanding the verdict under Rule of Civil Procedure 50, 28 U. S. C. A., raises a question of law only:

Whether there is any evidence which, if believed, would authorize a verdict against movant. The trial judge in considering these motions does not exercise discretion, but makes a ruling of law only, and if he errs the appellate court may reverse. A motion for a new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error; and he may grant one (and he alone can) because he thinks the verdict wrong, though supported by some evidence. The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected. The motion for a new trial is entirely independent of the other two motions and is governed by different principles, and has a different result. It never supersedes the jury, but as its name states, it results in another jury trial, perhaps with different evidence produced." . . .

"While it is not our function to weigh the evidence, we do agree with the trial judge's first expressed opinion that the weight of the evidence is 'overwhelmingly against the plaintiff.' . . . There was evidence of the appellant, not very explicit or positive, which if believed might authorize a jury to conclude he was hurt in the manner he claims. Because the trial judge does not believe it, because of appellant's own contradictions and conduct and of opposing evidence which seem to overwhelm it, is not ground for a judgment notwithstanding the verdict, and we must reverse that judgment. Howard v. Louisiana & A. R. Co., 5 Cir., 49 F. 2d 571.

"3. But it is ground for the trial judge to grant a new trial, though the trial was free of other error. The full discretion vested in the trial judge not having been exercised, we will remand the case with direction to the judge to grant a new trial instead of a judg-

ment notwithstanding the verdict if he continues to think the verdict to be against the overwhelming weight of the evidence."

Applicable Decisions of This Court.

In **Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U. S. . . ., 2 L. ed. 2d 953, 964, 78 S. Ct. . . .**, in an opinion delivered by Mr. Justice Brennan, the Court said:

". . . . The trial judge in the federal system has powers denied the judges of many states to comment on the weight of the evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence."

In **Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212, 67 S. Ct. 752, 91 L. ed. 849,** the Court declared:

". . . Determination of whether a new trial should be granted or judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case that no appellate printed transcript can impart. See March v. Philadelphia & W. C. Traction Co., 285 Pa. 413, 418, 132 A. 255; Bunn v. Purstein, 153 Pa. Super. Ct. 637, 638, 34 A. 2d 924. See also Yutterman v. Sternberg (C. C. A. 8th), 86 Fed. 321, 324, 111 A. L. R. 736, 32 Bankr. Rep. (N. S.) 392. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone."

In **Walker v. New Mexico and Southern Pacific Railroad Company, 165 U. S. 593, 17 S. Ct. 421, 41 L. ed. 837,** the Court said:

"The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine questions of fact, and no one to-day doubts that such is the legitimate duty and function of the court, notwithstanding the terms of the constitutional guarantee of right of trial by jury."

The Seventh Amendment was construed in **Capital Traction Co. v. Hof, 174 U. S. 1, 18 S. Ct. 580, 43 L. ed. 873,** as meaning a trial before a jury of twelve men in the presence and under the superintendence of a judge empowered, not only to instruct them on the law and to advise them on the facts but also (except on acquittal of a criminal charge), to set aside their verdict if in his opinion it is against the law or the evidence. It was held that trial before a justice of the peace and a jury was not a trial within the meaning of the amendment, one of the reasons being that the Act of 1823 permitting cases to be tried before a justice of the peace and a jury in the District of Columbia, did not authorize the justice of the peace to set the verdict of the jury aside for any cause, but made it his duty to enter judgment upon it forthwith, **as a thing of course.**

In the opinion in the foregoing case, the Court quoted with approval the following statement from Hale's History of the Common Law, chap. 12: "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it." Further in the opinion, there was quoted an opinion by Judge Sprague, delivered in the district court of the United States for the district of Massachusetts stating:

". . . 'At the time of the adoption of the Constitution, it was a part of the system of trial by jury in

civil cases that the court might, in its discretion, set aside a verdict.' 'Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards as understood when the Constitution was adopted.' United States v. 1363 Bags of Merchandise (1863), 2 Sprague 85-88."

Rule 63 and the Seventh Amendment.

Rightly construed Rule 63 of the Federal Rules of Civil Procedure is not in conflict with the Seventh Amendment. The discretion conferred upon a successor judge to decide whether he can perform the duties of the court after verdict is a judicial discretion. When the term "discretion" is invoked as a guide to judicial action, this Court has said, "it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." **Langnes v. Green, 282 U. S. 531, 541, 51 S. Ct. 243, 75 L. ed. 520.**

Rule 63 was written with the idea that no hard and fast rule could be made concerning the power of a successor judge to perform the duties of the court after verdict. There are case where the fact that the successor judge did not preside at the trial works no disqualification. Such a case is **Meldrum v. U. S., 146 Fed. 390, affirmed in 151 Fed. 177.** From the opinion of the district court it appears that the defendant's motion for a new trial at first assigned grounds requiring the weighing of the evidence by the judge who presided at the trial of the case. On presentation of the motion, however, the defendant through his counsel explicity waived all of those grounds and insisted only that the successor judge had no power to perform the functions of the judge who had died after the rendition of the verdict and while the motion for a new trial was

pending. Making his decision on the faked question of power, the successor judge held that he could act.

Rule 63 obviously contemplates that there may be cases where a judge who did not preside at the trial cannot properly perform the duty of weighing the evidence and passing on the motion for a new trial. Congress in the act conferring authority upon the Court to prescribe rules of civil procedure for the district courts took the precaution to provide:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."
>
> **28 U. S. C. A., Sec. 2072.**

The right of trial by jury "as at common law" included the right of the party against whom the jury verdict was returned to have the judge who presided at the trial weigh the evidence and decide whether he was satisfied with the verdict. This was a substantive right as valuable and important as the right to have the judge present when the evidence was introduced and to instruct the jury on the law. Trial by jury "as at common law" was not completed until this duty resting on the trial judge was performed. It could be performed only by the judge who presided at the trial.

In Barron and Holtzoff's Federal Practice and Procedure (Rules Edition), Vol. 3, Sec. 1302.1, it is stated:

> ". . . Everyone concedes that the weight of the evidence could not be raised by writ of error and thus was not subject to appellate review at the time the Seventh Amendment was adopted. But it was the practice at common law prior to that date for the trial to be conducted by a single judge at nisi prius,

and for motions for a new trial to be heard by the court sitting en banc at Westminster. It is argued that this review by the court en banc is more like present American appellate practice than it is like our motions for a new trial, addressed to the single judge who presided at the trial. Thus, it is contended that the Seventh Amendment does not prevent modern appellate courts from exercising those powers which might have been exercised by the full court sitting at Westminster in 18th century England.

"This argument oversimplifies the historical date. An exhaustive examination of the early English cases has led one writer to conclude there is not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court or certified, that the verdict was against the evidence and that he was dissatisfied with the verdict. Assuming the accuracy of the historical conclusion, the common law system was one in which the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict unjustified, and even then, only if he could persuade his brethren at Westminster to this view. Thus we have already liberalized the granting of new trials beyond that known at common law, since under the present American system, the trial judge can set aside the verdict on this ground without getting the approval of any other judge. . .

"By way of summary, the discretion of the trial court in passing on a motion for a new trial where it is claimed the verdict is against the weight of the evidence is not subject to review. A strong and consistent line of authorities is to this effect . . ."

The late Judge Jerome Frank of the Court of Appeals for the Second Circuit, concurring in **Dyer v. MacDougal**

et al., 201 F. 2d 265, 272, showed that the reason the orders of the trial judge granting or denying a new trial are seldom reviewable is because of his peculiar opportunity to evaluate evidence by taking the demeanor of the witnesses into consideration, saying:

> "On a motion for a new trial, the judge acts 'as the thirteenth juror', i. e., he evaluates the credibility of the orally-testifying witnesses and therefore their demeanor. But on a motion for a directed verdict he does not. The rule that a trial judge may legitimately consider demeanor in ordering new trials means that his new-trial orders are seldom reviewable; on the other hand, the rule that may not legitimately consider demeanor in considering directed verdict motions means that his orders on such motions are readily reviewable. See Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 254, 61 S. Ct. 189, 85 L. ed. 147."

Consistently with this view, this Court in **U. S. v. Johnson, 327 U. S. 106, 66 S. Ct. 464, 90 L. ed. 562, rehearing denied 327 U. S. 817, 66 S. Ct. 699, 90 L. ed 1040**, said:

> "It is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact."

In Moore's Fed. Prac., Vol. 7, par. 63.05, the view is stated that in the absence of consent of all parties, Rule 63 does not authorize a judge to enter a judgment on the basis of a transcript of the trial before another judge who dies or becomes disabled. The Court of Appeals for the Sixth Circuit in **United States v. Nugent, 100 F. 2d 215**, certiorari denied sub nom. **Fidelity & Columbia Trust Co. v. U. S., 306 U. S. 648, 59 S. Ct. 591, 83 L. ed. 1046**, a case tried without a jury, declared:

"The trial judge has the right and duty to observe the bearing and demeanor of the witnesses, and where the evidence is conflicting he may take those things into account. Such personal observations cannot be transferred to the printed page, and yet the judge may, and often must, give them weight in making his decision. In the present instance it is difficult to see how the judge who entered the findings had any proper opportunity to decide any question affected by the credibility of the witnesses. While the statute does not in terms require that the same judge shall hear the evidence and make the findings, since by universal practice and tradition these findings are based upon personal observation of the witnesses, and are conclusive upon the reviewing court, the statute impliedly requires that the same judge who hears the case shall make the findings and conclusions, and this requirement is mandatory."

The Court of Appeals for the Ninth Circuit in **Southern Pacific Co. v. Guthrie**, supra, said that the power to set aside a verdict as being against the clear weight of the evidence "belongs exclusively to the trial judge." The Court of Appeals for the Fifth Circuit in **Marsh v. Illinois Central R. Co.**, supra, said that the trial judge may grant a new trial "(and he alone can) because he thinks the verdict wrong, though supported by some evidence." Judge Taft, speaking for the Sixth Circuit Court of Appeals in **Felton v. Spiro**, supra, said that the action of the trial judge on such motion "is not the subject of review." And the Court of Appeals for the Fourth Circuit in **Snead v. New York Central R. Co.**, supra, said that the appellate court is "without power" to order a new trial upon this ground.

For the reasons clearly shown, petitioners say that the judgment of the successor judge that he could properly

perform the duties of the court in these cases after verdicts rendered notwithstanding he did not preside at the trial was contrary to the law and was not within his sound or judicial discretion; that not having heard the witnesses testify he was no better qualified than the Court of Appeals or this Court to weigh the evidence and decide whether the verdict should be set aside as being against the clear weight of the evidence; that the only judge who could perform this duty was Judge Davies, who died before passing on the motions filed by petitioners, raising the questions and without entering judgments on the verdicts; and that by construing Rule 63 as conferring upon him the power to enter the judgments and pass on the motions for a new trial over the objections of petitioners, the successor judge abridged or denied a substantive right of petitioners and failed to preserve the right of trial by jury as at common law and as declared by the Seventh Amendment.

REASONS RELIED ON FOR GRANTING THE WRIT.

Petitioners say that the Court of Appeals by its affirmance of the judgment of the District Court rendered a decision that is in conflict with:

(a) Applicable decisions of this Court;

(b) The decisions of other courts of appeals and its own prior decisions in the same matters;

(c) That it has decided an important question arising under the Rules of Civil Procedure adopted by this Court to govern the practice in the district courts which has not been, but should be, settled by this Court; and

(d) That it has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

PRAYER.

Wherefore, your petitioners pray that a writ of certiorari issue from this Honorable Court; and that the judgment of the Court of Appeals be reversed by this Court and the District Court be ordered and directed to grant new trials in both of these cases, and for such further relief as petitioners may be entitled to.

This July 24, 1959.

.....

FYKE FARMER,
1111 American Trust Building,
Nashville 3, Tennessee,
Attorney for Petitioners.